

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

75-7308

ORIGINAL

In The
United States Court of Appeals
For The Second Circuit

B

L. BATLIN & SON, INC.,

Plaintiff-Appellee,

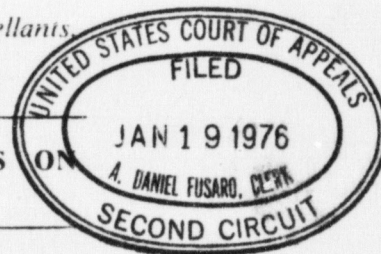
P/S

vs.

JEFFREY SNYDER, d/b/a J.S.N.Y. and ETNA PRODUCTS
CO., INC.,

Defendants-Appellants.

REPLY BRIEF OF DEFENDANTS-APPELLANTS
ON REHEARING



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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-7308

-----X
L. BATLIN & SON, INC., :
Plaintiff-Appellee, :
v. :
JEFFREY SNYDER, d/b/a J.S.N.Y., :
and ETNA PRODUCTS CO., INC., :
Defendant-Appellants. :
-----X

REPLY BRIEF OF DEFENDANT-APPELLANTS ON REHEARING

Reply to Appellee's Statement of Facts

At page 7 of Appellee's Brief on Rehearing, Batlin denies that its own expert testified that sculpting steps were necessary and that artistic ability was required in the designing of Snyder's bank. But, the cross-examination of Batlin's expert, Bloch, makes it clear that Batlin's expert recognized the necessity for a skilled artist and sculptor to do the creations and, for initial artistic sketches followed by artistic sculpting and the making of an artistic mold or die to be done

by the artist sculptor*.

Batlin also cites its expert's testimony that Snyder's bank lacks "originality". At A-53, li. 20, when the witness was asked whether there is "originality" in Snyder's bank, Snyder's counsel objected to this question as calling for a legal conclusion. After the objection was overruled, at A-54, li. 6, the simple answer "No" was given to the question. This is hardly an extensive expert analysis of whether Snyder's bank is "original" within the meaning of the Copyright Act. In fact, when Batlin's expert was cross-examined at A-67-68 concerning his definition of originality, it became clear that he was defining "originality" as "a complete change", e.g. "changing the pose, changing the mechanical function". He was not using the copyright test of authorship, as recited in Alfred Bell & Co. v. Catalda Fine Arts, 19 F.2d 99 (2 Cir. 1951), extensively discussed in Appellants' Main Brief at pp. 10-12.

Any testimony that the changes between the 11-inch tall cast metal bank and the differently appearing 9-inch tall plastic bank were merely made for utilitarian or functional reasons may have been adduced when Batlin's pliable expert witness was led through his direct testimony. But, during his cross examination,

*Note the testimony of Batlin's own expert, Bloch, at pp. 27-28 of Defendants' Main Brief on Rehearing

this witness reviewed (between A-68 and A-81), and grudgingly acknowledged the many characteristics by which the cast metal and plastic banks differ. These distinguishing features are outlined in Appellants' Main Brief, pp. 6-8. This is artistic, not functional change.

Batlin states that "No evidence was presented to indicate that any changes were made 'because a new work was being created,' that 'Snyder's bank was not created with the intent of making differences ...'. The record shows, however, that Snyder's objective from the very first was to create a new plastic bank modeled on the known iron metal bank (Snyder Affidavit - A-38, para. 11 et. seq.). Snyder did give evidence by way of affidavit and was present at the hearing on motion for preliminary injunction and available for examination by Batlin, if it so desired.

A Court of Appeals may, and in this Case
Should, make its own Determination as to
the Propriety of the Preliminary Injunction

The majority took full cognizance of the general rule applicable to the issuance of preliminary injunctions by lower courts in its opinion and was amply justified in making its own determination as to the propriety of the issuance of the preliminary injunction. The Court had before it sufficient facts and evidence to conclude that Snyder's bank is original, creative and copyrightable. As this Court said in Hills Bros. Coffee v. Hills Supermarkets, Inc., 428 F.2d 379, 380 (2 Cir. 1970):

"While we ordinarily phrase the rule on review of denial of preliminary injunction as calling for reversal only for abuse of discretion...where the denial rests upon a finding (confusion of marks) which we may determine on an equal basis with the trial judge, we need not uphold the denial."

This Court need not assess the credibility of any witnesses. The testimony of the expert witnesses (cross examination of Batlin's Bloch and entire examination of Snyder's Wurmbrand) is consistent on the relevant factual question concerning the artistic work done by Snyder's creators. See Ring v. Spina, 148 F.2d 647, 650 (2 Cir. 1945); cert. den., 335 U.S. 813 (1948). Concord Fabrics Inc. v. Marcus Bros. Textile Corp., 409 F.2d 1315, 1317 (2 Cir. 1969).

Majority Decision does not Alter
the Status Quo

In a footnote to its Opinion (fn. 5), the majority correctly observed:

"Amicus E. Mishan & Sons' argument that the injunction should be sustained in order to preserve the status quo is not well taken. The injunction changed the status quo by preventing the appellant from enforcing the copyright. Actions temporarily enforcing a copyright, thereby barring parties from doing business, have been sustained, pending litigation. Omega Importing Corp. v. Petri-Kline Camera Co., 451 F.2d 1190, 1197 (2d Cir., 1971), cert. denied, 408 U.S. 943; American Code Co., Inc. v. Bensinger, 282 F. 829, 835 (2d Cir., 1922)."

If, as Justice Clark is quoted as saying in Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2 Cir. 1962), the status quo to be preserved is to be grounded on the court's estimation of the respective legal rights of the parties, then, for the reasons stated by the majority, the preliminary injunction against Snyder was not warranted, and this Court properly restored the status quo by dissolving the preliminary injunction.

Batlin's Claim of Irreparable Injury is
Irrelevant and without Merit

Batlin's claim of irreparable injury is irrelevant to this appeal, the Court below having predicated its decision solely on its view of the originality and creativity of Snyder's work. Moreover, no statute or regulation requires Snyder to show irreparable injury as a prerequisite to his applying for or obtaining the U.S. Customs exclusion order. Indeed, Snyder detailed the harm that it would suffer by the continued importation and sale of copies of his copyrighted work in the U.S.A. at paragraphs 30-36 of his Affidavit (A-43-44). It should not be forgotten that it is Snyder who authored and originated an Uncle Sam bank, who went to the effort of having that bank designed, created and sculpted and that it is he and Etna, the licensed seller of his bank, who are being severely damaged. If Batlin is being damaged, it is only because it copied Snyder's work in violation of Snyder's copyright.

On the other hand, Snyder's goodwill as it relates to the copyright would be shattered by an injunction leaving Batlin in position to infringe Snyder's copyright. In everyday business, copyrighted works are often popular for a brief initial period - e.g., current novels, popular songs, TV script, etc. To follow Batlin's reasoning, would open the marketplace to "quick killings" by pirate merchants leaving a trail of copyright holders to the task and cost of pursuing them - if possible.

Snyder's Version of the Uncle Sam Bank
May be Regarded, for Copyright Classification
Purposes, as Either a Reproduction of a Work
of Art or as a Work of Art

The majority correctly observed that Snyder's version of the Uncle Sam bank "may qualify either as a work of art, 17 U.S.C. 5(g), as claimed in Snyder's application, or as a reproduction of a work of art, 17 U.S.C. 5(h)." The law on this point has been adequately briefed at pp. 30-31 of Snyder's main Brief. Batlin's comments, however, regarding a misrepresentation stemming from a desire to avoid answering a question as to new matter are merely frivolous. The many distinctive characteristics and substantial new matter distinguishing the Snyder bank from the prior metal bank are amply set forth in Snyder's main Brief at pp. 6-8. Moreover, the Copyright Office does not search. The Copyright Office does not study or even ask to see prior work on which a reproduction is based. Snyder did not

misrepresent. If there was an error, it was simply one of classification.

Snyder's Bank has much More than the
Minimal Originality Required for it
to be Copyrightable as a Work of Art
or as a Reproduction of a Work of Art

Snyder's bank has sufficient originality. See Nimmer on Copyright (supplemented to 1975), Secs. 19.2 and 20.2.

By applying the test of Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2 Cir. 1951) in the context of the precedents reviewed in Appellants' Main Brief at pp. 10-21, the conclusion is inescapable that Snyder has contributed not a "merely trivial variation", but a number of artistic changes which are recognizably his own. Those arose from the sculpting needed to produce his reduced size copyrighted work. Snyder authored not a mere copy of the work in the public domain, but an "original" work.

In Alva Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959), the famous Rodin sculpture "Hand of God" was reproduced precisely by the copyright proprietor on an approximate one-half scale. As observed by Judge Ryan in that case:

"However, to be entitled to copyright, the work must be original in the sense that the author has created it by his own skill, labor and judgment without directly copying or evasively imitating the work of another... Plaintiff has sustained this burden. Its copyrighted work embodies and resulted from its skill and originality in producing an accurate scale reproduction of the original." [177 F. Supp. at 267; emphasis supplied]

It is not without interest that Batlin, in its Brief at p. 21 observes "... since molds by their nature must be made by skilled rather than unskilled persons who have special training and knowledge and independent judgment." Indeed, if Batlin's conclusion that molds by their very nature are necessarily the product of skilled persons having special training and knowledge and independent judgment, then it would logically follow that the products made from such molds are copyrightable - and deservedly so. It does not follow, however, that "slavish copies of any object" would also be copyrightable.

The many cases defining and illustrating the meaning of "originality" as it relates to copyright law are more fully discussed in Snyder's main Brief on Rehearing at pp. 10-26. There is one misconception that had woven its web through the early stages of this case and still lingers on in the dissent by Judge Oakes and that is the confusion between "originality" and "novelty."

"The majority decision, as I have said, cheapens copyrights by making them meaningless. If no originality in terms of variation, but only 'physical skill' and 'special training' by the author, need be shown as the opinion holds, anyone can copyright anything, calling it a 'reproduction of a work of art.'"

As stated in Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (CA 2, 1951):

"'original' in reference to a copyrighted work means that the particular work 'owes its origin' to the 'author' ..."

"Authors" need not be inventors and their works need not be "new ideas." The Court below looked for "novelty" or a "new idea" in Snyder's plastic Uncle Sam bank, i.e. novelty in the sense of the patent law. The Court below did this in the related, pending E. Mishan & Sons action (75 Civ. 428).

Based upon his feeling that novelty was required for originality, creativity and copyrightability, the Court below decided that all of the many significant differences that were emphasized in the testimony and during the hearing were "merely trivial variations" and that there was no artistic contribution, despite the considerable artistic work done by the artist, sculptor who worked with Snyder (A-117). Judge Oakes was similarly misled by a false premise that begs the question. Once "originality", within the context of copyrights, is equated with "novelty", a term borrowed from the requirements for patentability, that false premise leads irresistibly down the path followed by the dissent as well as the court below. The majority recognized the dangers inherent in that type of reasoning and thus felt no constraint to search for a new idea. Instead it focused on the question of originality with authorship or attributability of a particular work to its author.

The Necessity for Artistic Skill is
Demonstrative of Originality and Creativity

The only fair and reasonable interpretation of the testimony of expert witnesses for both parties supports the

conclusion that Snyder's version of the Uncle Sam bank entailed artistic skill and independent judgment. That conclusion was reached not only by the majority but also to some extent by the Court below when it said:

"The Court agrees that a degree of physical artistic skill was necessary to produce the plastic article."

Notwithstanding its appreciation of the artistic skill involved, the Court below issued an injunction because it was misled by its search for some "new idea".

Valid Copyrights can Coexist as Reproductions
of Works in the Public Domain

Judge Learned Hand wrote in Fred Fisher, Inc. v. Dillingham, 298 F. 145, 149, 150:

"And so this case squarely raises the question whether it be a defense to a copyright that the precise work has independently appeared before it and is in the public domain."

Judge Hand observed that the accompaniment to the Jerome Kern score "Kalua" was virtually identical to the copyrighted accompaniment to a prior musical composition "Dardanella". That accompaniment was essentially a repeated refrain or "ostinato." "Substantially" the same accompaniment was, however, in the public domain prior to the composition of Dardanella. It had been published in slightly different form in a book of piano exercises by London. Finding the copyright to Dardanella valid, the Court said:

"It appears to me very obvious that the rule as to infringement has, and indeed must have, as its correlative, the rule that originality is alone the test of validity. Any subsequent person is, of course, free to use all works in the public domain as sources for his compositions. No later work, though original, can take that from him. But there is no reason in justice or law why he should not be compelled to resort to the earlier works themselves, or why he should be free to use the composition of another, who himself has not borrowed. If he claims the rights of the public, let him use them; he picks the brains of the copyright owner as much, whether his original composition be old or new. The defendant's concern lest the public should be shut off from the use of works in the public domain is therefore illusory; no one suggests it. That domain is open to all who tread it; not to those who invade the closes of others, however similar."

"I conclude, therefore, that the existence of Landon's 'ostinato,' though substantially the same as the 'Dardanella' accompaniment, did not invalidate the copyright pro tanto, there being no evidence, or, indeed, any reasonable possibility, that it was the source of Bernard's conception."

In Ferris v. Frohman, 223 U.S. 429 (1911) the infringers copyrighted a play and sought, by means of their copyright, to avoid the charge of infringement by the original authors. The Supreme Court correctly noted that an infringer cannot use a copyright as a shield against his wrongful acts. That case does not involve an adaptation of a play which was originally in the public domain, but simply a straightforward adaptation of another's work. It is irrelevant to the issue here where the facts and issues more closely resemble Alva

Studios, Inc. v. Winninger, 177 F. Supp. 265 (S.D.N.Y. 1959); and Fred Fisher, Inc. v. Dillingham, 298 Fed. 145 (S.D.N.Y. 1924). It is not at all meaningless that, where the work is initially in the public domain, e.g. Rodin's "Hand of God", that subsequent works which are based on or which seek to reproduce the initial work may themselves coexist as copyrightable works of art or copyrightable reproductions. Batlin contends "...how then can the average lay observer be expected to recognize whether the other copy was copied from defendants' or from the public domain work?". The "average lay observer" like Palsgraf's "reasonable man" is a convenient fiction of the law but the criterion is whether, in truth, a copy or adaptation was made from a prior work in the public domain or from a copyrighted version or reproduction thereof. That test is performed in a court of law and not in the marketplace. The results of that test depend on the evidence.

The Amicus Curiae Brief Adds Nothing
to the Issues and Points of Law Raised
and Discussed by the Parties

The Amicus Curiae Brief submitted by E. Mishan & Sons, Inc. contains an attempted restatement of the law pertaining to originality of copyrighted works. Mishan states that a modicum of originality is required for an artwork to be copyrightable. As extensively shown in the brief submitted by defendant-appellants Snyder and Etna (hereinafter jointly

referred to as Snyder), more than sufficient authorship and originality by the artist-creator of the Snyder Uncle Sam bank has been shown.

In their Statement of Facts, Mishan notes that the larger size, metal Uncle Sam bank is old, which Snyder admits. Snyder, an author as that term is defined under the copyright law and precedents, had his artist-creator move through various stages from this public domain work, to sketches, to models, to samples and to a final version. These steps all involved great artistic input, as extensively reviewed in Snyder's Main Brief.

Mishan notes that a number of the differences between Snyder's and the public domain banks were made for practical, rather than aesthetic reasons. However, Snyder first established the functional parameters within which its artistic work would be created. Once those functional parameters and requirements had been established, the artist-designer-creator was given free rein to produce the artistic plastic Uncle Sam bank which Snyder copyrighted. In every work, parameters of size (4 feet or 4 inches), material (metal, plastic), medium (oils, water colors), complexity, expense, etc. must be determined before the work is undertaken. Mishan confuses the original functional parameters which Snyder had to set to give the work form with the artistic input contributed by the artist-designer-creator. But, it

is the artistic contribution by the latter that is rewarded by the copyright here in issue.

Mishan suggests that the changes wrought by Snyder, as compared with the public domain bank, were minimal and resulted from the process of copying or knocking off. However, when you simply look at the two physical objects in issue, namely the public domain metal bank and Snyder's differently sized differently shaped, differently proportioned plastic bank, (with all of those features detailed by Snyder in its Main Brief), one can see that these are not merely minimal changes resulting from slavish copying.

Mishan frivolously suggests that Snyder's changes are merely imperfections in a mold. But a change in height of two inches, which is nearly 20%, with all other elements being proportionately reduced, followed by resculpting and redesigning to be artistically pleasing, cannot be a mere imperfection or mistake in molding.

In the section of Mishan's Brief beginning at page 9, Mishan purports to review many cases dealing with the definition of originality. In every one of these cases, it is necessary that there be some "distinguishable variation"; (Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F.2d 159, 161 (2 Cir. 1927)); "some substantial, not merely trivial originality....plaintiff's copy contains some inadvertent defects in shading, adding nothing to its worth in any

conceivable way and so minute as to escape the attention of the ordinary observer": (Chamberlin v. Uris Sales Corp., 150 F.2d 512 (2 Cir. 1945). All of these cases cited by Mishan support Snyder's viewpoint that Snyder made an original work. The differences between the public domain bank and Snyder's plastic bank are so obvious that even a casual comparison between the two of them will show at least some of these differences and a moderately careful study will clearly show all of the differences which Snyder details in its Main Brief.

Mishan at p. 13 of its Brief suggests that "copying" from the public domain cannot produce a copyrighted work. Yet, the numerous cases in Snyder's Main Brief confining the copyrightability of works inspired by previous works in the public domain cannot be denied.

Citing Nimmer on Copyright, Sec. 6.1, Mishan notes that "originality itself must exhibit a modicum of intellectual labor in order to constitute the product of an author." Snyder has provided much more than that modicum.

It is true, as Mishan states on p. 16 of its Brief, that a copyright registration is obtainable without an examination on the merits as to "prior art". That is precisely what Congress had in mind when the Copyright Act was enacted, as shown by the thorough discussion in Snyder's Main Brief of the history and reasoning behind copyrights in

the U.S.A. The courts protect those charged with infringement of an invalid copyright. But, in this case, there cannot be any real question as to the originality and authorship of Snyder's work.

Gardenia Flowers, Inc. v. Joseph Markovits, Inc., 280 F. Supp. 776 (S.D.N.Y. 1968); Chamberlin v. Uris Sales Corp., supra, and Florabelle Flowers, Inc. v. Joseph Markovits, Inc., 296 F. Supp. 304 (S.D.N.Y. 1968); and Donald v. Uarco Business Forms, 478 F.2d 764 (8 Cir. 1973) are all cases where insufficient originality and/or creativity were found because the variations from the previous work or the creative input was too minimal and trivial. But, in light of the extensive changes which Snyder made, and the definitions of copyrightability and originality in the copyright law, these precedents support, rather than negate, the copyrightability of Snyder's work.

In Section IV of its Brief, Mishan seeks to overturn the entire law of copyright in suggesting that one can never use public domain works as inspiration for copyrightable works. Snyder did not "copy" anything. Snyder created an original work and Snyder's Main Brief shows this.

The Majority Opinion correctly notes that Snyder did sculpt his work "from scratch". Snyder did not take a public domain work and cut a little off here, and patch a little on there. Instead, looking at the public domain

work, Snyder's artist-designer-creator designed, sketched and modeled a completely new work from scratch. In the same section of its Brief, Mishan, like Appellee Batlin, cites expert testimony in an effort to show that no skill or originality was involved in the creation of Snyder's bank. Yet, the review in Snyder's Main Brief of how all of the experts, both Batlin's and Snyder's, found there was an artistic contribution cannot be ignored.

With respect to the discussion by Snyder's expert Wurmbrand concerning the step of pantographing a work, Wurmbrand was describing that even if pantographing had been used, still artistic contribution would still have been required. But, in connection with Snyder's bank, more than pantographing had to have been involved. Not only is Snyder's bank smaller than the public domain bank, but its anatomical and clothing proportions and shapes are different from the public domain bank and certain features are completely unique. Snyder's bank involved original artistic work.

In the Section of Mishan's Brief entitled "Snyder's Contributions", Mishan purports to separately list some, but not all, of the differences between Snyder's bank and that of the public domain, and to show that each of these differences, when considered alone, is not sufficient to support copyrightability. Yet, Snyder did not make one difference at a time and is not asserting that any one difference amounts to copyrightability. What Snyder, as author, had

his artist-designer-creator do is go through all of the design steps detailed in Snyder's Main Brief. Because the resulting product was independently artistically created, necessarily, so many differences resulted. These differences are not themselves the reason why Snyder's bank is copyrightable. They are instead evidence that Snyder's artist-designer-creator made at least that minimal artistic contribution that is required for originality and copyrightability.

The inclusion of Section VI of Mishan's Brief, which relates to the alleged insufficiency of Snyder's copyright notice, is an inexcusable error by an attorney. The only issue before this Court is the copyrightability of Snyder's with respect to its originality and creativity. When Mishan stated the issue on appeal at page 8 of its Brief, the copyright notice is not mentioned. Snyder's copyright notice should not be considered here.

Unfortunately, Mishan's irrelevant charge, if left unanswered, might raise some suspicions among the members of this Court. Therefore, were the copyright notice before this Court and were all of the pertinent evidence bearing upon this issue before this Court (and the evidence is not here because this issue and the evidence concerning it forms no part of the record in this case at all), it would show that Snyder has been using the mark "J.S.N.Y." on hundreds of products for more than two years. In fact, virtually

every product offered for sale and sold by Etna and that is manufactured by it and the design or manufacture of which has been commissioned by Snyder carries the trademark "J.S.N.Y.".

The "J.S.N.Y." trademark is well recognized, not only by members of the novelties and giftware trade, of which Snyder is a member, but among Snyder's customers as well. Furthermore, the president of E. Mishan & Sons, Inc., Isaac Mishan, testified in a deposition in the related Mishan action that he recognized the trademark "J.S.N.Y." and that he knew that it was a trademark of Snyder or Etna.

Furthermore, Snyder's copyright registration was issued by the Register of Copyrights to "J.S.N.Y.", as an accepted alternate designation of defendant Jeffrey Snyder, whereby the Copyright Office, in following its own Rules and Regulations, recognized that the copyright notice on Snyder's bank was sufficient.

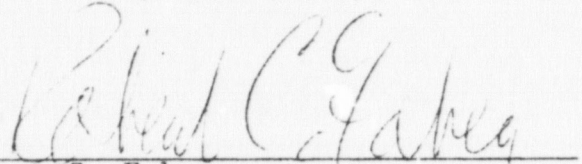
It is regrettable that Mishan felt compelled to make an unsubstantiated, unsubstantiable allegation on an issue not before this Court, which allegation unfortunately, required Snyder to make the foregoing brief summary of the situation to blunt the possibly harmful effect of Mishan's argument. This Court must ignore the issue of the sufficiency of Snyder's copyright notice, first because the notice is unquestionably sufficient, and second, because that issue was never raised before this Court and is not before this Court on this appeal.

Conclusion

The Majority Decision of this Court properly applied the Copyright Law to the facts herein, and should be confirmed.

Respectfully submitted,

New York, New York
January 16, 1976



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

L. BATLIN & SON, INC.,
Plaintiff- Appellee,

- against -

JEFFREY SNYDER, d/b/a/ J.S.N.Y. and ETNA PRODUCTS
Defendant- Appellants

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

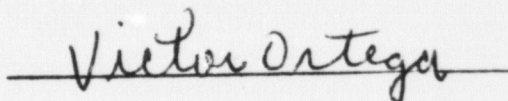
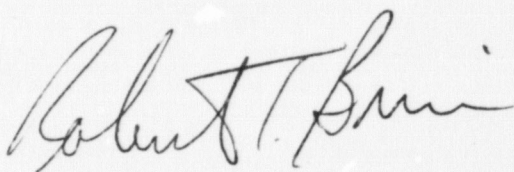
I, Victor Ortega, being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York

That on the 19th day of January 1976 at 41 East 42nd Street, New York, New York
521 Fifth Avenue New York, New York

deponent served the annexed Reply Brief
LACHENBACJ, LILLING & SIEGEL
JACOBS & JACOBS

the Attorneys in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 19th
day of January 76



VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418850
Qualified in New York
Commission Expires July 1, 1977